88-638

No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

**OCTOBER TERM, 1988**

BILLY JOE LAFFERTY,
*Petitioner,*

vs.

CITY OF COOTER, RICK COOPER, STEVE CHILDERS and JUNE KEEN, in Their Official and Individual Capacities As Aldermen,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October, 1988

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## QUESTIONS PRESENTED FOR REVIEW

1.) May a city delegate to a narrow group of landowners the absolute and unreviewable power to determine who may or may not be granted a municipal liquor license?

2.) Is Ordinance 1754(13)(A) within the scope of the police powers of the State of Missouri as declared by its Supreme Court and the Missouri Zoning Enabling Act, Chapt. 89, R.S.Mo.?

3.) May enforcement of Ordinance 1754(13)(A) lead to arbitrary and capricious results?

## TABLE OF CONTENTS

Questions Presented for Review ..... I
Table of Contents ..... II
Table of Authorities ..... IV
Opinions Below ..... 1
Jurisdictional Statement ..... 1
Constitutional Provisions and Statutes Involved ..... 1
Statement of the Case ..... 3
Reasons for Granting the Writ ..... 5

I. The Ordinance Unlawfully Delegates to a Narrow Group of Private Landowners the Standardless and Absolute Power to Decide Who May or May Not Receive a License ..... 5

A. The Ordinance Is Not a Legitimate Exercise of the Police Power ..... 10

1. The Delegation of Power to Private Landowners Is Void and Unenforceable ..... 11

2. The Ordinance Is Unenforceable for Failure to Comply With Missouri Zoning Enabling Act ..... 15

B. Waiving Consent for One License Applicant While Requiring It of Another in an Adjacent Location Is Repugnant to the Equal Protection Guaranty ..... 18

Conclusion ..... 19

Appendix of Statutes and Rules

Appendix 1 (Order of Court of Appeals entered June 13, 1988) ..... A1

Appendix 2 (Order of Court of Appeals entered April 13, 1988) ..... A2
Appendix 3 (Order and Memorandum of District Court entered August 31, 1987) ..... A4
Appendix 4 (Excerpts from Chapter 89 R.S. Mo.) ..... A17
Appendix 5 (Letter from Mayor Cooper dated May 13, 1985) ..... A22

## TABLE OF AUTHORITIES

### Cases

*City of St. Louis v. Russell*, 22 S.W. 470 (1893) ....11, 12, 14
*City of Vinta Park v. Girls Shelter Care, Inc.*, 664 S.W.2d 256, 260 (Mo. App. 1984 and cases cited therein) ..... 15
*Cusack v. City of Chicago*, 242 U.S. 526, 61 L.Ed. 472, 37 S.Ct. 190 (1917) ..... 10, 11
*Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 49 L.Ed.2d 132, 96 S.Ct. 2358 (1976) ..... 7
*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926) ..... 10
*Eubank v. Richmond*, 226 U.S. 137, 57 L.Ed. 156, 33 S.Ct. 76 (1912) ..... 5, 7, 9, 10
*Hays v. City of Poplar Bluff*, 173 S.W. 676 (Mo. 1915) ..... 12, 13, 14
*Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963) ..... 13
*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505 (1982) ..... 7, 8, 11
*Payton v. Riverside*, 640 S.W.2d 137 (Mo. App. 1982) 19

*State ex rel. Daniels v. Kasten*, 382 S.W.2d 714 (Mo. App. 1964) ..... 13

*State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928) ..... 6, 7, 9, 11

*Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L.Ed. 2d 797, 94 S.Ct. 1536 (1974) ..... 10

*Yick Wo v. Hopkins*, 188 U.S. 356, 366, 368, 65 S.Ct. 1064, 30 L.Ed. 220 ..... 7

**Constitutional Provision**

U.S. Const., Amend. XIV, §1 ..... 1, 7, 18

**Statutes and Regulations**

Ordinance No. 1754(13)(A) ..... 2, 3, 4, 5, 18

R.S.Mo. §89.010 ..... 2, 4, 14, 15

R.S.Mo. §89.020 ..... 2, 14, 15

R.S.Mo. §89.030 ..... 15

R.S.Mo. §89.040 ..... 2, 14

R.S.Mo. §89.050 ..... 2, 14, 16

**Hearing Reports**

*1 Hearings on the Nomination of Louis D. Brandeis before a Subcommittee of the Senate Committee on the Judiciary*, 1057, 1065 (1916) ..... 17-18

## OPINIONS BELOW

The Eighth Circuit Court of Appeals affirmed without opinion. Its order is contained in the Appendix.

The opinion of the District Court is unreported and included in the Appendix.

## JURISDICTIONAL STATEMENT

This petition for writ of certiorari is for review of the judgment of the United States Court of Appeals for the Eighth Circuit entered on April 13, 1988.

The Court of Appeals entered its order denying rehearing and rehearing *en banc* on June 13, 1988. On September 13, 1988 this Court entered its order extending the time for filing a petition for writ of certiorari until October 14, 1988.

Jurisdiction of the Supreme Court is conferred by Title 28, Section 1254(1) of the United States Code.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are:

"*Fourteenth Amendment, Section 1, U.S. Constitution.* All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state de-

prive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The municipal ordinance involved is ORDINANCE NO. 1754, Section 13(A) which provides:

"Further, no license shall be issued for the sale of intoxicating liquor within a residential district unless applicant shall have presented a petition to the City Council (along with all other applicable forms relating to such application) which petition shall include the signatures of at least 75% of owners of real property located within a radius of 600 feet of the proposed location, consenting therein to the establishment of such a place of business and to the granting of a license therefor. The 600 feet of restriction set out herein shall be measured from that portion of the licensee's building nearest to the area of the radius of 600 feet in every direction."

The statutes involved in this case and reproduced in the Appendix are:

Revised Statutes of Missouri, §§89.010-89.110

## STATEMENT OF THE CASE

At issue is the validity of a city ordinance which delegates to private property owners the power to determine who may be licensed to sell alcoholic beverages and who may not.

In May 1985, petitioner leased a commercial building in the City of Cooter for the purpose of selling alcoholic beverages. He subsequently applied for an available municipal liquor license giving that building as his proposed business location. The building was located on Main Street in the main business area of the city and immediately adjacent to a package liquor store licensed to sell intoxicating liquor. The city made an investigation of petitioner's background and received a favorable report. Thereafter, the mayor informed petitioner that the city found no reason to refuse him a license, except for the provision of Section 13(A) of the city liquor licensing ordinance. That section prohibited the issuance of a liquor license "within a residential district" without the approval of 75% of the property owners within 600 feet of the proposed location for the license. The mayor further stated that plaintiff would be required to obtain the written consents before a license could be issued. Respondents subsequently denied the application for a license for the reason that petitioner had failed to comply with the consent provision of the ordinance.

Respondents have admitted that a liquor license was available and that plaintiff was entitled to a license upon obtaining the necessary consents. They further admit that the city has not enacted any zoning ordinances or regulations or made any comprehensive plan for regulating the

use of property as provided by Missouri's Zoning Enabling Act, §89.010 *et seq.* R.S.Mo. Likewise, the city admits that following the adaption of Section 13(A), the mayor discussed the ordinance with the owners of the package liquor store and agreed that the consent provisions of the ordinance would not be enforced to require him to obtain the consents for the issuance of future licenses since he had operated a package store at the time the new ordinance was passed. But for that agreement, the package store owner would have been required to obtain consents from virtually the same property owners within the 26 surrounding acres required of petitioner.

Plaintiff filed suit pursuant to 42 U.S.C. §1983 in the United States District Court for the Eastern District of Missouri, Southeastern Division on August 19, 1985 alleging that the ordinance was arbitrary and illegal and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. Jurisdiction was invoked pursuant to 28 U.S.C. §1331 and §1343(3) and (4). The district court on cross motions for summary judgment dismissed and petitioner filed notice of appeal. The Eighth Circuit Court of Appeals dismissed the appeal prior to receiving the record on appeal or the time for filing Appellant's brief. On petition for rehearing and rehearing *en banc* the court vacated its previous order and reinstated the case. After the filing of brief and oral argument the court dismissed without opinion. Petitioner again sought rehearing and rehearing *en banc* which was denied on June 13, 1988.

## REASONS FOR GRANTING THE WRIT

Section 13(A) of the City Ordinance restricts the ownership and use of real property by conferring on a narrow group of private property owners the power to determine who may or may not be granted a municipal license. The enforcement of the ordinance presents an important federal question which may affect numerous municipalities in virtually every state. Integrally related to the Due Process and Equal Protection analysis is the invalidity of the ordinance under Missouri law as reflected in state legislative enactments and judicial decisions of the Missouri Supreme Court.

### I.

### The Ordinance Unlawfully Delegates to a Narrow Group of Private Landowners the Standardless and Absolute Power to Decide Who May or May Not Receive a License.

In *Eubank v. Richmond,* 226 U.S. 137, 57 L.Ed. 156, 33 S.Ct. 76 (1912), the Court invalidated a city ordinance that empowered two-thirds of the owners of property on any street to establish within a specified range, a building set-back line for that street for constructing new buildings. The ordinance was challenged on Due Process and Equal Protection grounds. The question before the Court was whether the ordinance constituted a valid exercise of the state's police power. Initially, the Court noted that the ordinance had been passed under a broad Virginia statute granting cities the authority to regulate construction of buildings, set-back lines and land use. Nevertheless, the Court held the ordinance as unreason-

able and in violation of the Due Process Clause because it subjected the rights of some to the virtual will of others without prescribing any standard or rule for the exercise of that power. In such a case, it was said the property holders might act "solely for their own interests or even capriciously."

Sixteen years later in *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928), the Court again considered the delegation of governmental power. There a municipal zoning ordinance excluded homes for the elderly from a single family residential district except upon the written consent of two-thirds of the property owners within 400 feet of the proposed building. The Plaintiff, a trustee of a home for the elderly, had applied for a license to construct a home for the aged poor within a single family district. The application was denied solely because of the failure to furnish the written consents. The Court held:

> The right of the trustee to devote its land to any legitimate use is *property* within the protection of the constitution . . . . The section [of the ordinance] purports to give the owners . . . within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent [of building] is bound by the *decision or inaction* of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily

> and may subject the trustee to their will or caprice. *Yick Wo v. Hopkins,* 188 U.S. 356, 366, 368, 65 S.Ct. 1064, 30 L.Ed. 220. *The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.* [Citations omitted] [Emphasis supplied] (at pp. 121-122)

The question of delegation of legislative power arose in *Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 49 L.Ed.2d 132, 96 S.Ct. 2358 (1976) in the context of a city wide voter referendum. The Court distinguished a referendum from the delegation issue addressed in *Eubank* and *Seattle Title Trust Co.*:

> The thread common to both decisions is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a *narrow* segment of the community, not to the people at large. (426 U.S. 677)

In upholding the referendum provision of the city charter, the Court observed that the Ohio constitution had preserved to voters of a municipality the power of referendum and could not be considered to be a delegation of power by government.

In *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505 (1982), the Court addressed a Massachusetts ordinance prohibiting the issuance of a liquor license within 500 feet of a church or school where the church or school filed a written objection. The statute was challenged as a violation of the Due Process Clause of the Fourteenth Amendment, the Establishment Clause of the First Amendment and the Sherman Act. The Court stated that the statute was more

than simply an exercise of zoning power, since it further delegated the power to determine whether a license should be issued to private individuals. Noting that "[t]his was a power ordinarily vested in agencies of government," the Court stated:

> We need not decide whether, or upon what conditions, such power may ever be delegated to non-governmental entities; here, of two classes of institutions to which the legislature has delegated this important decision making power, one is secular, but one is religious. Under these circumstances, the deference normally due a legislative *zoning* judgment is not merited. [Emphasis supplied] (at p. 122)

The Court held the ordinance invalid under the Establishment Clause, leaving the due process question for future consideration.

The regulation of the sale of beer and the issuance of business licenses is inherently and indisputably a governmental function and an exercise of the state's police power. *Larkin* at p. 122. Likewise, the delegation to private property owners of the power to determine who may engage in the sale of beer by giving or withholding their consents is no less an exercise of governmental power.

In the present case, the property owners in within a 26 acre area are given absolute power under the ordinance to decide whether to approve the issuance of a license. No standards or rules are provided upon which to base their judgments. The city is bound by the action or inaction of the owners who are free to withhold their consents for selfish or arbitrary reasons and subject an applicant to their will. They may deny a license to a business within

600 feet solely on the basis of the applicant's race, sex, religion, national origin, political affiliation or shoe size.

One of the chief vices condemned by this Court in its review of the ordinances in *Eubank* and *Seattle Title Trust* was the lack of uniformity and the inherent potential for abuse. In *Eubank* one side of a street might have a set-back line while the other did not; houses might be staggered back and forth on successive blocks; set-back lines might be set at greatly different distances. Yet, for all that, the *Eubank* ordinance at least had the virtue of being consistent for the group of property owners who compelled the establishment of a set-back line. For whenever the owners of two-thirds of the relevant property decided to impose a set-back, it would have a single line established by a public body and applicable uniformly to themselves and their neighbors. They could not, establish one line for themselves and another for those they did not like or one line for their friends and another for those with whom they might disagree.

The ordinance *sub judice* is far more offensive because it allows property owners to target and block one person's application for a liquor license and at the same time waives it for another in spite of the fact that the two locations are side by side.

The question arises, whether once consent is given, for a license, the same property owners may thereafter prevent the issuance of a license by withholding their consent for an adjacent building within the same area for which the consent was granted. Such uneven treatment would be highly questionable. Yet, that is the very infirmity which exists in the present case.

**A. The Ordinance Is Not a Legitimate Exercise of the Police Power.**

The Court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926) held that zoning measures imposing restrictions on the use of property must find their justification in the police power exerted in the interest of the public. The validity of a municipal zoning ordinance must in the first instance be judged by reference to the zoning powers granted under state law. If the state has withheld the zoning power or prescribed standards and rules to be followed, an ordinance adopted in opposition to the state law is unauthorized and not within the police power of the state. If an ordinance is found to be within the state's policy powers, the question then becomes whether the exercise of that power was arbitrary or capricious. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974), the Court held that in dealing with economic and social legislation a legislative enactment will not be invalidated if it is "reasonable, not arbitrary" and "bears a rational relationship to a [*permissive*] state objective." [Emphasis supplied].

In *Eubank* the Court initially noted that the ordinance was passed under the authority of a state statute and had been upheld by the Virginia Supreme Court. The sole issue was whether the ordinance was an unreasonable exercise of the police power.

In *Cusack v. City of Chicago*, 242 U.S. 526, 61 L.Ed. 472, 37 S.Ct. 190 (1917), the Court initially observed that state legislature had declared that the subject of billboard regulation would be subject to municipal regulation and that decision had been sustained by the Supreme Court of Illinois. It further stated:

> It is settled for this court by this decision that the ordinance assailed is within the scope of the power conferred on the city of Chicago by the legislature, that it is to be treated as proceeding from the law-making power of the state, and that, therefore, it is a valid ordinance unless the record shows it to be clearly unreasonable and arbitrary. (242 U.S. 529)

In like fashion, the Court in *Seattle Title Trust, supra,* stated that the ordinance had been upheld by the highest court of the State of Washington as a valid exercise of the police power. Indeed, the Court noted that the trustee had conceded that in its general scope the ordinance was valid. The issue was the reasonableness of the delegation to adjoining property owners of the power to defeat an application for a building permit.

In *Larkin, supra,* the Massachusetts statute had been upheld by the state Supreme Judicial Court. The only issue addressed was whether the statute violated the Establishment Clause.

### 1. The Delegation of Power to Private Landowners Is Void and Unenforceable.

The city ordinance before the Court in this case cannot be said to enjoy the presumption of validity as those in the foregoing cases. Missouri Courts have consistently held ordinances which make the issuance of a permit or license dependent upon the consent of adjacent property owners void as an unlawful delegation of the state's legislative power to private individuals.

The Missouri Supreme Court in *City of St. Louis v. Russell,* 22 S.W. 470 (1893) declared such a require-

ment to be "clearly void, and without legal force and effect." The ordinance prohibited the issuance of a building permit for a stable to be located on any block within the city "without the written consent of the owners of one-half of the ground of said block." The Court held:

> . . . [T]he ordinance under consideration is void because of the delegation of legislative power by the mayor and municipal assembly of the City of St. Louis to the owners of one-half the ground in the block where the livery stable was builded.
>
> We are *also* of the opinion that the ordinance is invalid, for the reason that by its provisions one citizen is permitted to erect a livery stable in a certain locality, by obtaining the written consents of the owners of one-half the ground in the block, while another of like merit would not be permitted to do so for the want of such consents. It would enable one person to construct and operate a livery stable upon one side of the street, by getting the written consents of the owners of one-half the ground in the block, while another would be denied the privilege of erecting a similar building in the opposite block across the street or in an adjoining block because of his inability to obtain such consent . . . . The effect would be discrimination in favor of certain persons, and against others, entitled to equal rights before the law. This Court has on different occasions held ordinances, less obnoxious, *unreasonable* and *invalid*. [Citations omitted] (at p. 472)

Similar consent provisions have been held not to be within the state's police powers. In *Hays v. City of Poplar Bluff*, 173 S.W. 676 (Mo. 1915), the municipal

ordinance prohibited the construction of any building, the outer walls of which were to be constructed of wood within the area of the city described as the "fire limit". It did, however, allow the city to issue a permit for the construction of a wooden building when "accompanied by the written consent of all persons owning property within the block" in which the proposed building was to be erected. The Supreme Court of Missouri ruled:

> Our conclusion is that the ordinance in question *is void because it is not within the legislative powers delegated to the city by its charter;* because it violates the fundamental principle inherent in our constitutional system that where a municipal corporation seeks by ordinance to restrict for public good the rights of the individual otherwise incident to the ownership of property, it must do so by a rule applicable to all alike under the same circumstances, and cannot make his enjoyment of his own dependent on the arbitrary will or caprice of the municipal legislature; and because its refusal to consider applications for relief from the enforcement of its prohibitory terms, unless accompanied by the written consent of the property owners of the block, *amounts to a delegation of the legislative power of the city to such property owners.* (at p. 680)

In *State ex rel. Daniels v. Kasten,* 382 S.W.2d 714 (Mo. App. 1964), the realtors brought a mandamus action challenging the refusal of the city to issue a permit for the construction of an addition to their slaughterhouse. The ordinance provided that no permit could be issued for the construction of a business building in any "residential district" except upon the submission of

a petition signed by three-fourths of all property owners in the district giving their consent to such permit. Citing *Russell* and *Hays, supra,* the court in granting the writ stated:

> [A]ny other rule could lead to undesirable results. For instance, one person might obtain permission from the required three-fourths because he was more popular in that area, while another might be refused though the business and buildings were identical. Then again another person might succeed in buying enough land in the area to have a controlling voice in the matter. Thus the effect of such a provision is to make the right to build in a particular location dependent wholly on the will and whim of the owners in that vicinity without the application of any sensible fixed guidelines or standards, calculated to protect the interests of all the inhabitants, and result in unequal treatment under the law. (at pp. 717-718)

The problems encountered by the consent provisions in city ordinances are frequently addressed through comprehensive municipal zoning plans. Such plans require public hearings and careful assessment of the character and suitability of areas of a city for particular uses. Exceptions to the zoning ordinances are usually made through a municipal board of adjustment after public consideration of equities of a given case with the full opportunity for any neighbor who may be affected to be heard and his objections given due consideration in the decision making process. The decision of the boards of adjustment are subject to court review. §89.010 *et seq.* R.S.Mo. and especially §89.020-§89.050).

### 2. The Ordinance Is Unenforceable for Failure to Comply With Missouri Zoning Enabling Act.

Under state law as enunciated by the Supreme Court of Missouri, it is well established that the Zoning Enabling Act, R.S.Mo. §39.010 *et seq.* constitutes the sole source of municipal zoning authority. See: *Huttig v. City of Richmond Heights,* 372 S.W.2d 833 (Mo. 1963); *City of Vinta Park v. Girls Shelter Care, Inc.,* 664 S.W.2d 256, 260 (Mo. App. 1984 and cases cited therein). An attempt by the City to impose a restriction on the use of real property, by its very nature involves the exercise of the zoning authority conferred by Chapter 89, R.S.Mo. and to be effective must fully comply with the statutory requirements and procedures.

The city ordinance here is more than just a liquor licensing law. It conditions the issuance of a liquor license on the use and location of the property within a specified district without first complying with the requirements of Missouri's Zoning Enabling Act, Chapter 89, R.S.Mo. That Act authorizes the establishment of "zoning districts" within cities, towns, and villages. Section 89.020 provides, *inter alia*:

> For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes.

Section 89.030 further provides in relevant part:

> *Zoning districts*—For any or all of said purposes, the local legislative body may divide the municipality into

> districts of such number, shape, and area as may be deemed best suited to carry out the purposes of Sections 89.010 to 89.140; and within such districts may regulate and restrict the . . . use of buildings, structures, or land.

Zoning regulations are required by Section 89.040 to be made in accordance with a comprehensive plan to promote health, and the general welfare and other stated purposes. The statute provides:

> Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses . . . .

The municipality must establish a zoning commission and board of adjustment. Section 89.050 provides, *inter alia,* as follows:

> The legislative body of such municipality shall provide for the manner in which such districts shall be determined, established, and enforced and from time to time amended, supplemented or changed. *However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard.* [Emphasis supplied]

The foregoing discussion amply attests to the fact that the consent requirement of the ordinance is not within the scope of the police power granted to municipalities. That conclusion is confirmed by the fact that in adopting an ordinance restricting the business use of real property without attempting to comply with Missouri's Zoning Enabling Act, the City has thwarted the legislative command

of the State of Missouri. The Missouri Supreme Court has repeatedly invalidated the attempted delegation of legislative power and held those municipal ordinances unreasonable as a matter of legislative policy where they permit inconsistent, arbitrary and capricious results.

The City is not without recourse to plan and regulate within "reasonable limits" the character and suitability of areas of the city through zoning. Indeed, zoning is a salutary alternative to the standardless consent requirement and its unbridled and inherent potential for abuse. Indeed, these very evils were eloquently exposed by former Justice Louis Brandeis in testimony against a similar law:

> You cannot with yard stick decide whether the location of the saloon would be an injury. It may or may not be . . . . But if you give power to every person within twenty five feet of every proposed liquor store to determine that question for himself, you put into his hands a great power which he is likely to abuse. It needs no evidence . . . to prove that such power will often be abused. To give a neighboring real estate owner an uncontrollable right to object may under circumstances, be giving him the whip hand over the applicant for a license; and it will depend entirely upon the character of him who holds that whip, whether this instrument of castigation be used for the owner's protection or be applied in securing unjust booty . . . [W]hen you give the absolute right to object, you have put into the hands of men an irresistible weapon.
>
> [Argument of Louis D. Brandeis before the Joint Committee on Liquor Law of the Massachusetts Legislature, Feb. 27, 1891, reprinted in *1 Hearings on the*

*Nomination of Louis D. Brandeis before a Subcommittee of the Senate Committee on the Judiciary* 1057, 1065 (1916).]

**B. Waiving Consent for One License Applicant While Requiring It of Another in an Adjacent Building Is Repugnant to the Due Process Clause.**

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It requires that all persons similarly situated should be treated alike before the law. The general rule for determining the validity of a legislative classification is whether the differing treatment is "rationally related to a legitimate state interest." As discussed above, Section 13(A) of the ordinance does not further a "legitimate" or "permissive" state interest in delegating authority or failing to comply with state zoning laws for restricting the use of real property. Indeed, it frustrates established policies of the state of insuring decisions are made in a rational manner and by officials whose decisions are subject to scrutiny and review by the courts.

A second issue is whether the ordinance has been arbitrarily enforced. The city has asserted that it was justified in agreeing to exempt the package liquor store. He must nevertheless submit his application for a license each year but is not required to obtain the consents of the landowners within 600 feet (approximately 26 acre area) of his business. It was said that the package store was "grandfathered in" by the understanding with the city after the ordinance was adopted. In essence the city asserts that the use is a non-conforming one. This

proposition of property law generally allows the owner the right to the continuation of a non-conforming use of property enjoyed before the enactment of a zoning use restriction. It was not urged by the city that the package store had acquired a vested property right to the renewal of a license each year. It asserted that no one can have a vested or inherent right to sell alcoholic beverages since a license is but a revocable permit. *Payton v. Riverside,* 640 S.W.2d 137 (Mo. App. 1982). In this situation the city has determined that sale of intoxicating liquor in an almost identical location is reasonable and consistent with the public convenience and welfare. At the same time it permits virtually the same landowners to exclude another qualified applicant.

## CONCLUSION

For these reasons, Petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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October, 1988

# APPENDIX

(June 13, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 87-2261EM

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Billy Joe Lafferty,
Appellant,

vs.

City of Cooter, et al,
Appellees.

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Appeal from the United States District Court for the Eastern District of Missouri.

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Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

June 13, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Filed April 13, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 87-2261

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Billy Joe Lafferty,
Appellant,

v.

City of Cooter; Rick Cooper; Steve Childers and June Keen, in their Official and Individual Capacities,
Appellees.

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Appeal from the United States District Court for the Eastern District of Missouri.

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Submitted: March 15, 1988
Filed: April 13, 1988

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Before BOWMAN, Circuit Judge, WRIGHT, Senior Circuit Judge,* and MAGILL, Circuit Judge.

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PER CURIAM.

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*The Honorable Eugene Wright, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Billy Joe Lafferty challenges in his appeal the actions of the appellees in denying an application for a liquor license on the grounds that he had failed to secure the consent of sufficient property owners within six hundred feet as required by a City of Cooter ordinance.

Having carefully considered the issues raised, we conclude that the decision of the district court granting appellees' motion for summary judgment is correct in law and that there were no genuine issues of fact. Accordingly, the judgment of the district court is affirmed. *See* 8th Cir. R. 14.

Appellant's motion for attorney's fees and sanctions is also dismissed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Filed August 31, 1987)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

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No. S 85-183 C

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BILLY JOE LAFFERTY,
Plaintiff,

v.

CITY OF COOTER, et al.,
Defendants.

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**ORDER**

In accordance with the Memorandum issued herewith,

IT IS HEREBY ORDERED that the motions of the defendants for summary judgment be and they are sustained, and the motions of the plaintiff for leave to amend and for partial summary judgment and preliminary injunction be and they are denied. The action is dismissed on the merits. The trial setting is therefore vacated. The parties shall bear their own costs of the action.

/s/ David D. Noce
United States Magistrate

Dated this 31st day of August, 1987.

(Filed August 31, 1987)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

---

No. S 85-183 C

---

BILLY JOE LAFFERTY,
Plaintiff,

v.

CITY OF COOTER, et al.,
Defendants.

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**MEMORANDUM**

This cause is before the Court on the motion of the defendants to reconsider as one motion their two previous motions for summary judgment, pursuant to Rule 56, Federal Rules of Civil Procedure. Plaintiff has also moved the Court to reconsider his previous motion for partial summary judgment and preliminary injunction. The parties consented to the exercise of jurisdiction over the action by a United States Magistrate under 28 U.S.C. §636 (c).

Plaintiff Billy Joe Lafferty brought the present action pursuant to 42 U.S.C. §1983 for injunctive relief, damages, and an award of attorney's fees under 42 U.S.C. §1988, challenging the denial of a liquor license by the defendants. Plaintiff asserts that the action by the defendants, who

are the City of Cooter, Mayor Rick Cooper, and Aldermen Steve Childers and June Keen, contravened the First and Fourteenth Amendments to the Constitution of the United States. Plaintiff alleges not only that infirmities exist in the city ordinance on which the denial was based, but also that an arbitrary and malicious application of the ordinance occurred.

For the purposes of this motion, the undisputed relevant facts are that plaintiff applied to the City of Cooter for a liquor license to sell beer for consumption on the premises of a pool hall which he intended to open. Plaintiff obtained a license application from defendant Cooper. (Pl. Deposition, April 15, 1986, *at* 78-79.) Defendant Cooper reported to the board of aldermen in a letter dated May 13, 1985 that an investigation of the plaintiff for purposes of the liquor license had been completed and that no reason had been found to refuse the license to plaintiff. (Pl. Complaint Exh. A.) The letter further stated that the plaintiff was required to present a petition containing the signatures of 75% of the owners of real property within a radius of 600 feet of the requested business location approving of the license with his application. The letter cited the city attorney's advice on the application of §13(a) of Ordinance No. 1754.[1] *Id.* Plaintiff

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1. Ordinance No. 1754 (Pl. Complaint Exh. C) sets forth the requirements for the issuance of a liquor license for the City of Cooter. It was modeled on an ordinance of Kennett, Missouri. (Pl. Memorandum in Opposition to Def. Motion for Summary Judgment, filed May 21, 1986, *at* 9 n.5.) Section 13(a) of the Cooter ordinance is as follows: "Further, no license shall be issued for the sale of intoxicating liquor within a residential district unless applicant shall have presented a petition to the City Council (along with all other applicable forms relating to such application) which petition shall include the signatures of at least 75% of owners of real property lo-

(Continued on following page)

returned the application at the May 14, 1985 meeting of the board of aldermen. (Pl. Complaint Exh. B.)

It is agreed by all parties that the City of Cooter has no formal zoning laws and that all of the businesses in Cooter, save one, are on Main Street. (Pl. Deposition Exh. 8.) It is in this area that plaintiff proposed to establish his business. Plaintiff leased a building on Main Street next to a package liquor store owned by his brother, Lewis Lafferty. (Pl. Deposition, *at* 77.) While the proposed location is within the primary business area of Cooter, this area is not exclusively commercial. There are several residences nearby. (Pl. Deposition Exh. 8.) In fact, the parties agree that there is no location in the City of Cooter that is not within 600 feet of a residence. (Def. Cooper's Deposition, April 15, 1986, p. 45.)

On July 9, 1985 the Cooter Board of Aldermen voted to deny plaintiff the pool hall license. The stated reason was plaintiff's noncompliance with the ordinance requirement that 75% of the residential owners consent. Defendants June Keen and Steve Childers voted No. Alderman Bud Ashcroft voted Yes. (Pl. Complaint Exh. E.)

Plaintiff contends that his rights to equal protection under the laws have been violated, because a similarly situated individual has maintained a liquor license without complying with the ordinance. Plaintiff alleges that his procedural due process rights were violated by the

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Footnote continued—

cated within a radius of 600 feet of the proposed location, consenting therein to the establishment of such a place of business and to the granting of a license therefor. The 600 feet of restriction set out herein shall be measured from that portion of the licensee's building nearest to the area of the radius of 600 feet in every direction." (Pl. Complaint Exh. C.)

lack of an impartial decision maker. Plaintiff further alleges that, under a proper reading of the ordinance (assuming it to be valid), his substantive due process right to a liquor license was violated by the defendants' arbitrary and capricious interpretation of the ordinance denying him his right to the license. Lastly plaintiff asserts a pendent state claim that the ordinance is an invalid attempt to regulate uses of real property in violation of Missouri state zoning statutes, Chapter 89, Revised Statutes of Missouri.

Defendants respond that the ordinance is a valid one regulating the sale of intoxicating beverages pursuant to municipal authority granted by the state. Defendants further claim qualified immunity as a defense, citing *Chase v. McMasters,* 573 F.2d 1011, 1019 (8th Cir.), *cert. denied,* 439 U.S. 965 (1978). They argue that their interpretation of the ordinance was a reasonable one because in Cooter commercial businesses and residences are intermingled; they are not in separate city zones. They further claim the non-existence of malice or impermissible motives in their interpretation of the ordinance. Finally, defendants contend that plaintiff's claim for damages fails the "speculation and conjecture" test of attempting to prove lost future income.

Both plaintiff and defendants have previously petitioned the Court for summary judgment, in whole or in part, and have both been denied. Both plaintiff and defendants have argued and agreed that the only issue as to defendants' liability is one of construction of the ordinance, an issue of law rather than fact. (Pl. Motion to Reconsider, July 17, 1987; and Def. Motion for Summary Judgment, March 11, 1987, *at* 4-5.) Defendants

have now filed a motion for reconsideration of their two previous motions for summary judgment. Plaintiff has also filed a motion for reconsideration of his prior motion for partial summary judgment and a preliminary injunction.

This Court may grant summary judgment only if the pleadings, admissions, stipulations, depositions and affidavits demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.Pro. 56(c), *Celotex Corporation v. Catrett*, ..... U.S. ....., 106 S.Ct. 2548, 2552 (1986); *Board of Education, Island Trees, etc. v. Pico*, 457 U.S. 853, 863 (1982). Summary judgment may properly be granted against a plaintiff if the Court gives the plaintiff the benefit of all reasonable inferences from the evidence yet is convinced that there is no set of facts which would entitle the plaintiff to relief under the applicable law. *See, Bellflower v. Pennise*, 548 F.2d 776, 777-78 (8th Cir. 1977); *see also, Odom v. Tripp*, 575 F. Supp. 1491, 1492-93 (E.D. Mo. 1983).

When a decision turns upon the meaning of words in a statute or regulation, a legal question is presented. *Northern Natural Gas Co. v. O'Malley*, 277 F.2d 128, 137 (8th Cir. 1960). Questions in regard to the construction of ordinances are matters of law. *League to Save Lake Tahoe v. Capital Enterprises*, 685 F.2d 1142, 1144 (9th Cir. 1982). Summary judgment is an appropriate mechanism to dispose of legal questions of statutory and regulatory construction. *Standard Oil Company v. Department of Energy*, 596 F.2d 1029, 1066 (Temporary Emergency Court of Appeals 1978); *Mobil Oil Corporation v. Federal Energy Administration*, 566 F.2d 87, 92 (Temporary Emergency Court of Appeals 1977).

The Court will first consider plaintiff's contention that the ordinance is an invalid attempt to regulate uses of real property in violation of state zoning statutes, specifically, Chapter 89, R.S.Mo. Defendants state that the ordinance merely regulates the sale of intoxicating liquors. This argument is addressed first, because a holding in plaintiff's favor on this issue would avoid the necessity of the Court addressing plaintiff's constitutional claims.

Chapter 89, R.S.Mo., is a permissive, not mandatory, scheme for the regulation of the uses of real property. Zoning is not required by state law of a fourth class municipality such as Cooter; a municipality that has zoning need not provide for more than one use in all circumstances. *McDermott v. Village of Calverton Park,* 454 S.W.2d 577, 581-82 (Mo. en banc 1970). The City of Cooter is thus not required to enact zoning ordinances. Plaintiff claims, however, that the ordinance is an invalid attempt to enact zoning without following the requirements of Chapter 89, R.S.Mo. The Court disagrees.

Plaintiff invokes the general rule of construction that a legislative body means to state what it expressly provides in a legislative enactment. Using the doctrine of *expressio unius est exclusio alterius,* plaintiff argues that because the ordinance refers to "residential districts" within the city, it limits the application of §13(a) to such districts rather than allowing application of §13(a) to the city at large. Plaintiff argues that this is persuasive evidence that the ordinance was intended to recognize other districts, *i.e.*, commercial, where the requisite signatures would not be required.

The language of §13(a) of Ordinance No. 1754 was modeled after an ordinance adopted by Kennett, Missouri.

In construing a statute adopted from another source, it is generally held that the interpretation placed upon the statute by the originating body (Kennett) follows to the adopting body (Cooter). *See, John Deere Company v. Jeff DeWitt Auction Company, Inc.*, 690 S.W.2d 511, 514 (Mo. App. 1985). It is also true, however, that the paramount goal of statutory construction is to ascertain the intent of the law makers from the language used, to give effect to that intent if possible, and in so doing to consider the words used in their plain and ordinary meaning. *Metro Auto Auction v. Director of Revenue,* 707 S.W.2d 397, 401 (Mo. en banc 1986). In ascertaining the true intent of a legislative body, a reasonable interpretation must be given in light of the legislative objective. *Collins v. Director of Revenue,* 691 S.W.2d 246, 251 (Mo. en banc 1985).

The principle of *expressio unius* (expression of one thing excludes others not expressed) should be invoked only when aids to interpretation suggest that the statutory language at issue was meant to be exclusive. *Bailey v. Federal Intermediate Credit Bank of St. Louis,* 788 F.2d 498, 500 (8th Cir.), *cert. denied,* ..... U.S. ....., 107 S.Ct. 317 (1986). The record does not indicate that the Cooter ordinance language was meant to be exclusive. The clear objective of the ordinance was the regulation of the sale of intoxicating liquors within the City of Cooter which does not have "use" zoning. A non-exclusive reading of the ordinance serves the purposes for which it was enacted and allows the exercise of the authority necessary to express the police power contained therein. *Id.*

While the City of Cooter may have adopted the ordinance language used by the City of Kennett, which has a zoning law with differentiated use districts, it does not

follow that Cooter adopted Kennett's interpretation where such an interpretation would lead to unjust, absurd, or unreasonable consequences. *See, State ex rel. Lack v. Melton,* 692 S.W.2d 302, 304 (Mo. en banc 1985); *State ex rel. Lebeau v. Kelly,* 697 S.W.2d 312, 315 (Mo. App. 1985). To hold that the City of Cooter intended to adopt differentiated use districts (a zoning plan) by the adoption of a liquor control ordinance would be an unreasonable result. There is no legislative history offered indicating such an intention by the City of Cooter.

Cooter Ordinance No. 1754 is clearly a valid ordinance pertaining to restrictions on licenses issued for the sale of intoxicating liquors. It is not a zoning ordinance designed to generally regulate the uses of real property.

*State ex rel. Payton v. City of Riverside,* 640 S.W.2d 137, 140 (Mo. App. 1982) [hereinafter *Payton*], provides a concise discussion of a municipal corporation's authority to regulate intoxicating liquors. The law in Missouri clearly holds that there is no inherent right to engage in the liquor business and that "the state may impose conditions, burdens and regulations as is deemed wise and proper." *Id., citing May Department Stores, Inc. v. Supervisor of Liquor Control,* 530 S.W.2d 460, 468 (Mo. App. 1975). Municipalities derive their authority in this area from the state and may exercise, in any reasonable and proper manner, the power granted. *Payton, supra, at* 140.[2]

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2. Also, the ordinance in question is not void for uncertainty. An ordinance will not be declared void for uncertainty, if it is susceptible of any reasonable construction. *Payton, supra, at* 140. So long as the ordinance appears to be within the scope of the delegated power, courts are not to substitute their judgment for the legislative body which enacted the ordinance especially where the purely legislative acts of a municipality are involved. *Id.*

Having found the ordinance to be a valid one regulating intoxicating liquors, this Court must next determine whether the interpretation of the ordinance by the defendants was a reasonable one. Because no "residential district" exists by law within the City of Cooter, the phrase "within a residential district" must have a meaning other than the meaning it technically denotes. Each portion of the statute must be given meaning unless it conflicts with the ascertained legislative intent. *State of Missouri v. Sweeney*, 701 S.W.2d 420, 423 (Mo. en banc 1985). The interpretation of an ordinance by the body in charge of its enactment and application is entitled to great weight. *Coots v. J. A. Tobin Construction Co.*, 634 S.W.2d 249, 252 (Mo. App. 1982) (interpreting a zoning ordinance). Clearly the ordinance was reasonably interpreted as denoting the entire City of Cooter as one "residential district."

Plaintiff asserts that his brother's nearby package liquor business has not been required to obtain the approval of nearby landowners for the reissuance of its liquor license since the enactment of Ordinance No. 1754. (Affidavit of Lewis Lafferty filed July 22, 1987.) This dissimilar treatment, plaintiff contends, is evidence of an arbitrary and capricious interpretation of the ordinance in plaintiff's case as well as a violation of equal protection of the laws. The Court does not agree. The defendants reasonably interpreted §13(a) of Ordinance No. 1754 to not apply to then existing businesses. Cooter chose to "grandfather in" Lewis Lafferty's already established retail liquor business. (Affidavit of Rick Cooper, filed July 28, 1987.) Furthermore, Section 11(a) of Ordinance No. 1754 provides a mechanism to monitor the conduct of already licensed liquor businesses within the

community. Section 13(a) compliments §11(a) by providing a mechanism for evaluating proposed liquor businesses.

When an individual contends that a municipal body has unconstitutionally applied an ordinance in his particular case, courts are not entitled to review the evidence and reverse merely because a contrary result might have been reached. *Burns v. City of Des Peres,* 534 F.2d 103, 108 (8th Cir.), *cert. denied,* 429 U.S. 861 (1976). The function of the court is to "ascertain whether there has been a transgression upon the [individual's] constitutional rights." *Id.* Plaintiff must "prove that the defendants' actions were clearly arbitrary, unreasonable and discriminatory and bore no substantial relation to the health, safety, convenience and welfare of the community," in order to support his constitutional claims. *Burns, supra, at* 108.

The interpretation of the ordinance given by the defendants, even when all the undisputed evidence is viewed most favorably to plaintiff, does not rise to the level of arbitrary, capricious, unreasonable or discriminatory action. Defendants' interpretation of the ordinance is a reasonable one, especially given the concerns of public health, safety, and order present in the regulation of intoxicating liquors. *See, Payton, supra, at* 140.

Having found defendants' interpretation a reasonable one, it must next be seen whether the denial was undertaken with malice or impermissible motives causing a deprivation of constitutional rights to plaintiff. Plaintiff's deposition testimony concedes that no malice by defendants was present. (Pl. Deposition, especially 82 and 86.) Plaintiff also admits that defendants allowed him further opportunity to gain the needed signatures. (*Id., at* 83-84.)

As to establishing impermissible motives on the part of defendants, plaintiff fails here as well. General opposition to the establishment of a pool hall is not an impermissible motive by a decision maker. Cognizable conflict of interest by local legislators arises out of financial or pecuniary interests, not matters of policy. *See*, 2 C. Sands & M. Libonati, *Local Government Law*, §11.10 (1981).

As plaintiff acknowledges in his deposition, defendants allowed him a further opportunity to obtain signatures and reduced the number of required signatures by not counting landowners who did not wish to become involved in the issue. (Pl. Depo., 82-83.) Plaintiff fails to make any showing that defendants Cooper and Keen's prior opposition to his proposed business in any way affected their decision regarding his application.

Finally, plaintiff argues that he has been denied equal protection of the law in that defendant's treatment of an already licensed business was different than that given to his proposed enterprise. As plaintiff neither belongs to a protected class nor asserts a fundamental right, the actions of defendants are evaluated under the "minimal scrutiny" or rational basis test. The classification of proposed and existing businesses is valid, if there is any conceivable basis upon which the classification might relate to any legitimate governmental interest. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533 (1972). This test is used for all classifications which relate to matters of economics or social welfare. *Hodel v. Indiana*, 452 U.S. 314, 331 (1981); *Dandridge, supra, at* 485-86; *Moreno, supra, at* 533. In attacking the classification, plaintiff has the burden of demonstrating to the Court that the classi-

fication does not have a rational relationship to a legitimate governmental interest but that it is clearly arbitrary and irrational. *Hodel, supra, at* 331-32. In light of the foregoing discussion, plaintiff clearly has failed to meet his burden.

The Court finds and concludes that Cooter Ordinance No. 1754 is a valid regulation of the sale of intoxicating liquor pursuant to delegated state authority and that the defendants' interpretation of the ordinance was reasonable. Plaintiff has suffered no constitutional violation. Defendants' motion for summary judgment will be granted. Plaintiff's motion for summary judgment and for injunctive relief will be denied.

Defendants' assertion that plaintiff fails the "speculation and conjecture" test of proving lost future income and defendants' invocation of immunity need not be addressed in light of the above discussion.

Plaintiff has recently moved this Court to allow amendment of his complaint, pursuant to Fed.R.Civ.Pro. 15, to increase the compensatory and punitive damages sought from defendants Cooper, Keen and Childers, and to add a prayer for compensatory damages from the City of Cooter. Although leave to amend is to be given freely, in the present cause it is denied as moot.

An appropriate Order is issued herewith.

/s/ David D. Noce
United States Magistrate

Dated this 31st day of August, 1987.

# CHAPTER 89
# ZONING AND PLANNING

**89.010. Applicability of Law.**—The provisions of sections 89.010 to 89.140 shall apply to all cities, towns and villages in this state.

**89.020. Powers of municipal legislative body—group homes, classification, standards, restrictions—enforcement of zoning beyond lake shorelines, when, how.**—1. For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

* * *

**89.030. Zoning districts.**—For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of sections 89.010 to 89.140; and within such districts may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

**89.040. Purpose of regulations.**—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.

**89.050. Powers and limitations of legislative body in city—hearings, notice.**—The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality.

**89.060. Change in regulations, restrictions and boundaries—procedure.**—Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change duly signed and

acknowledged by the owners of ten percent or more, either of the areas of the land (exclusive of streets and alleys) included in such proposed change or within an area determined by lines drawn parallel to and one hundred and eighty-five feet distant from the boundaries of the district proposed to be changed, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of section 89.050 relative to public hearing and official notice shall apply equally to all changes or amendments.

**89.070. Zoning commission—appointment—duties.**—In order to avail itself of the powers conferred by sections 89.010 to 89.140, such legislative body shall appoint a commission, to be known as "The Zoning Commission", to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the zoning commission.

**89.080. Board of adjustment—appointment—term—vacancies—organization.**—Such local legislative body shall provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of sections 89.010 to 89.140 may provide that the said board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.

**89.090. Board of adjustment—powers.**—1. The board of adjustment shall have the following powers:

(1) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of these sections or of any ordinance adopted pursuant thereto;

* * *

(3) In passing upon appeals, where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.

2. In exercising the above mentioned powers such board may, in conformity with the provisions of sections 89.010 to 89.140, reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made and to that end shall have all the powers of the officer from whom the appeal is taken.

* * *

**89.110. Board of adjustment—decisions subject to review—procedure.**—Any person or persons jointly or severally aggrieved by any decision of the board of adjustment, or any officer, department, board or bureau of the municipality, may present to the circuit court of the

county or city in which the property affected is located a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board. Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment. . . .

CITY OF COOTER
COOTER, MO 63839

May 13, 1985

All Aldermen
City Clerk
Mr. Butch Lafferty
Mr. Billy Joe Lafferty

This letter is in regard to the beer license application by Mr. Billy Joe Lafferty.

After an investigation of Mr. Billy Joe Lafferty we find no reason to refuse a license to him. However the city attorney advise that the location for which the license was applied was within 600′ of a residential area. Section 13 (A) does not prohibit the issuance of a license within 600′ of a residential area, but rather it says NO license will issure unless the applicant produces the signatures of 75% of the owners (not renters) within a radius of 600′ of the requested business location. Therefore, before the license can issue, those signatures must be presented.

When the required signatures are obtained, we will meet in a special meeting so as not to delay this matter.

Rick Cooper
Mayor

88-638 (2)

No.

Supreme Court, U.S.
FILED
NOV 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLY JOE LAFFERTY,
Petitioner,

vs.

CITY OF COOTER, RICK COOPER, STEVE CHILDERS and JUNE KEEN, in Their Official and Individual Capacities as Aldermen,
Respondents,

On Appeal From The
8th Circuit Court of Appeals

# RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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October, 1988.

Reproduced by E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106 (816) 421-3030

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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BILLY JOE LAFFERTY,
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CITY OF COOTER, RICK COOPER, STEVE CHILDERS and JUNE KEEN, in Their Official and Individual Capacities as Aldermen,
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On Appeal From The
8th Circuit Court of Appeals

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**RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI**

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II

## QUESTIONS PRESENTED FOR REVIEW

The question for review is the appropriateness of the Federal District Court Magistrate's ruling granting all the respondents a summary judgment. Therefore, the issue becomes, in general terms, "... whether the plaintiff (petitioner) failed to make a showing sufficient to establish the existence of essential elements to his case on which plaintiff (petitioner) has the burden at trial." (Rule 56[C] and the language of the Celotex case cited and relied upon by the said Magistrate. Celotex Corp. vs. Catreet, 477 U.S. 106, 106 S.Ct. 2548, 91 L.Ed.2d 265 [1986]).

III

Breaking that rule down more specifically and applying it to the case at bar, the issues become whether this petitioner who seeks certiorari could have stated a civil rights cause of action for having been denied a liquor license by this city. This involves the sequence of related issues which were all resolved in favor of the defendants (respondents) by the Magistrate, to-wit: ... First, whether the Ordinance involved is valid (the said Ordinance which was enacted in 1983 is fully set out in petitioner's appendix); ... Second, whether the interpretation of the Ordinance by respondents, as city officials, was a reasonable one, and ... Third, whether the denial of the liquor license was undertaken with

malice by the respondents and whether their action caused a deprivation of a known or established constitutional right (this involves the ultimate issue of whether plaintiff (petitioner), in seeking a liquor license, belongs to a protected class or seeks protection of a fundamental right which the Court below answered in the negative).

Lastly, while respondents state that these were the step-by-step issues decided in their favor below by the Magistrate and the 8th Circuit Court of Appeals, they further state that the resultant issue here in the Supreme Court is whether this case then presents an important issue for determination in this Court. Specifically, whether this Court

should rule on the legality of a Missouri 4th Class City's regulation of liquor licenses.

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . II

TABLE OF CONTENTS . . . . . VI

TABLE OF AUTHORITIES . . . . . .VII

STATEMENT OF THE CASE . . . . . 1

A. NATURE OF CASE AND COURSE OF PROCEEDINGS . . . . . 1

B. FACTS . . . . . 3

ARGUMENT . . . . . 12

CONCLUSION . . . . . 49

# TABLE OF AUTHORITIES

## CASES


| | Page |
|---|---|
| Anderson vs. Liberty Lobby, Inc., 477 U.S. _____ 91 L.Ed.2d 202, 106 S.Ct. _____ (1986) . . . . . | 14,15,16, 18,50 |
| Bailey vs. Federal Intermediate Credit Bank of St. Louis, 788 F.2d 498, 500 (8th Cir.)(1986). | 41 |
| Burns vs. City of DesPeres, 534 F.2d 103 (8th Cir.)(1978) . | 45,46 |
| California vs. LaRue, 409 U.S. 109, 120, 34 L.Ed. 342, 93 S.Ct. 390 (1972) . . . . . | 29 |
| Celotex Corp. vs. Catreet, 477 U.S. 106, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986) . . . . . | II,14,15, 16,17,40, 48,50 |
| Chase vs. McMasters, 573 F.2d 1011, 1019 (8th Cir.) (1978) . | 45,46 |
| Citizens Mutual Fire and Lighting Insurance Society vs. Schoen, 93 S.W.2d 669 (Mo. 1936) . . . . . | 35 |
| City of Flat River vs. Mackley, 212 S.W.2d 462 (Mo. 1968) . . . . . | 42,43 |

Collins vs. Director of Revenue, 691 S.W.2d 246, 251 (Mo. 1985) . . . . . 25,42

Coots vs. J.A. Tobin Construction Co., 634 S.W.2d 249 (Mo. 1982) . . . . 24

Hayes vs. Poplar Bluff, 173 S.W. 678 (Mo. 1915) . . . 32

Herrera vs. Valentine, 653 F.2d 1221 (8th Cir.) (1981) . 45,46

J.C. Nichols Company vs. City of Kansas City, 639 S.W.2d 886 (Mo.App. 1982) . . 39

Larkin vs. Grendels Den, Inc., 459 U.S. 116, 74 L.Ed.2d 27
297, 103 S.Ct. 505 (1982) . . 28,29

League to Save Lake Tahoe vs. Capitol Enterprise, 685 F.2d 1142, 1144 (9th Cir. 1982) . . . . 21

Metro Auto Auction vs. Director of Revenue, 707 S.W.2d 397 (Mo. 1986) . . . . 41

Monell vs. Department of Social Services of City of New York, 436 U.S. 658, 1978 . . . . 45,46

Nichols vs. North Kansas City, 214 S.W.2d 710 (Mo. 1948) . . . . 38

Northern Natural Gas Co. vs. O'Mally, 277 F.2d 128 (8th Cir.) (1960) . . . . 21

Passley vs. Johnson, 304 S.W.2d 903 (Mo. 1957) . . . . 37

St. Louis vs. Russell, 22 S.W. 470 (Mo. 1893) . . . . 32

Standard Oil Company vs. Department of Energy, 596 F.2d 1029, 1066 (Temporary Emergency Court of Appeals, 1978) . . . . 21

State ex rel. Copper Kettle Restaurants, Inc. vs. City of St. Robert, 424 S.W.2d 73 (Mo. App. 1968) . . . . 40

State ex rel. Hewlett vs. Womach, 196 S.W.2d 809, en banc (Mo. 1946) . . . . 32,33 34,36,38

State ex rel. Kimberling vs. Peterson, 214 S.W.2d 739 (Mo. App. 1948) . . . . 39

State ex rel. Lack vs. Melton, 692 S.W.2d 302, 304 (Mo. 1985) . . . . 25

State ex rel. Lebeau vs. Kelly, 697 S.W.2d 312 (Mo. App. 1985) . . . . 25

State ex rel. Payton vs. City of Riverside, 640 S.W.2d 137, 140 22,23 30,34

(Mo. App. 1982) . . . . 39,52

State of Washington ex rel. Seattle Title Trust Company vs. Roberge, 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928) . . . . 30,31

Vest vs. Kansas City, 194 S.W.2d 38 (Mo. 1946) . . . . 38,43

STATUTES AND OTHER AUTHORITIES

Chap. 89 RSMo. . . . . 21,22

Endlich on Interpretation of Statutes, Section 329 . . 42

Federal Rule Civ. Pro.50(A) . 16

Federal Rule Civ. Pro.56(C) . II,3

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42 U.S.C. 1983 . . . . 1

43 corpus juris, Municipal Corporation, Section 220(B) . 43

S.Ct. Rule 17 . . . . 53

## STATEMENT OF THE CASE

A. Nature of case and course of proceedings:

Petitioner seeks relief under 42 U.S.C. 1983, claiming a violation of his civil rights when the respondent, City of Cooter, Missouri, a 4th Class City in said State, did not issue him a liquor license to sell beer for consumption on the premises when he failed to comply with the Cooter liquor license Ordinance. The respondents below are the City itself, population 480, the Mayor, (Cooper) and the two Aldermen that voted against the issuance of the license (Childers and Keen).

The respondents moved for summary judgment in the Federal District Court of Missouri (Eastern

District, Southeastern Division) which was sustained by a U.S. Magistrate. Petitioner's appeal of that ruling was initially dismissed by the 8th Circuit Court of Appeals as frivolous. Thereafter, petitioner moved for a rehearing which was considered by the 8th Circuit to be a motion to reconsider the dismissal of the appeal. Rather than actually rule on that motion, petitioner was directed to show cause why the appeal should not be dismissed as frivolous. This Court then reinstated a briefing schedule.

After briefing and oral argument, the 8th Circuit ruled per Curian, summarily and without a printed opinion, in favor of respondent City, Major, and Aldermen. (See petitioner's appendix).

B. Facts:

As will be stated further in the argument section, the requirements of Federal Rule Civ. Pro. 56(C) for sustaining a summary judgment motion have been met here, in that the pleadings, admissions, stipulations, depositions, and affidavits demonstrated no genuine issue of material facts, for the following facts are undisputed: (Respondents deem it necessary to present these undisputed facts to correct omissions by petitioner in his fact statement).

Petitioner Lafferty, at the time he filed for a beer license in Cooter and continuously thereafter, worked a full-time 8 hour day job as a welder/fitter in Blytheville, Arkansas, a town 10 miles travel from

Cooter. The building petitioner sought to occupy for the tavern was owned by his brother, and he was going to rent it if he could get a beer license. He was not going to run the tavern himself, but rather would continue his full-time job in Blytheville and have someone else run same. The brother, Lewis Lafferty, has a package store in the very same building. The said Lewis Lafferty has had his liquor license long before the passage of the 1983 Cooter Ordinance here in question. An Affidavit of Rick Cooper was attached to respondents' motion for summary judgment which indicated that the applications of Lewis Lafferty were treated as "grandfathered" and the Ordinance "provided a mechanism to

monitor the conduct of already licensed liquor businesses," quoting the Magistrate.

Petitioner obtained a liquor license from Mayor Cooper and filled it out. Then, at a Board of Aldermen meeting, the procedure as to processing the license was discussed. First, petitioner was investigated by the Cooter police and Mayor Cooper later reported to the Board that the investigation was complete and that insofar as that investigation was concerned, nothing was found in petitioner's background to disqualify him from having a license. According to the Ordinance, the next step was to determine if petitioner had complied with the rest of the Ordinance by obtaining a petition containing the

signature of 75% of the owners of real property located within a radius of 600 feet of the proposed location. This procedure started at the May 14, 1985, meeting. Thereafter, these Aldermen and the Mayor met with and worked with petitioner and his family throughout a series of meetings in an attempt to give aid to petitioner to comply with the petition-signature provision. The first thing the City assisted petitioner with was to determine the 600 foot radius. The Aldermen drew one circle, but petitioner believed a smaller circle or radius was appropriate and drew a smaller circle inside the City's. The respondent City officials agreed to use petitioner's smaller inside circle, thereby reducing the number of

signatures he would need. Petitioner Lafferty stated in his deposition, as contained in the summary judgment motion, "... we done it as fair as we thought possible for both of us." He further stated in the deposition excerpts cited by respondents in their summary judgment motion, that he never felt that he was being treated unfairly by the City or any of the respondents. The City obtained the help of the City Tax Collector to identify the property owners within the agreed-upon smaller circle and gave these names to the petitioner.

To further help reduce the number of signatures, the respondents had established specific guidelines to use and no deadline was ever imposed upon petitioner to get the petition

submitted. Petitioner's relatives lived within the circle and respondents accepted their signatures, including petitioner's wife.

It was not until July 9, 1985, after two months of attempts by petitioner, his wife and family, to get signatures, that the application was denied at a board meeting. Said denial was for the sole and only reason of lack of signatures. The list of names obtained had been submitted to the board on multiple occasions, with the board even calling special meetings day and night to accommodate petitioner (Cooper deposition indicated a night meeting on June 11th and a noon meeting on June 12). The board, instead of initially denying the application for

lack of signatures, sent the petitioner back for further opportunities to get more signatures and repeated this procedure at meeting after special meeting. After two months, it was apparent to the board that the requisite number of signatures could not be obtained and the petitioner himself urged a decision rather than keep trying.

The final tally indicated that in this town of 480, there were 42 eligible owners in the 600 foot circle to be contacted. Petitioner, therefore, needed 75% of 42 or a figure of 31 names. Petitioner had 22 names on his petition, three of whom were determined by the respondents to actually live in the same home which reduced his petition to 19 names. One

of those was petitioner's wife and another petitioner's brother; however, these were allowed by the Aldermen. It was therefore understood that petitioner did not comply with the Ordinance.

Respondents, in their motion for summary judgment, presented facts about the layout or makeup of their community. It is uncontested fact between the parties that Cooter is very small and has no formal zoning laws. There is no location in the town that would not be within 600 feet of a residence. The proposed location for petitioner's liquor license is in an area, consisting of a few empty buildings, a grocery store, the City Hall, and a gas station. There are several residences mixed in with these

and several residences close nearby, some at the back door of petitioner's proposed location and across the street.

## ARGUMENT

Respondents' argument against certiorari will first parallel the Magistrate's decision which granted the respondents' summary judgment. (See petitioner's appendix for the complete opinion granting summary judgment). Respondents will further assert that the logic and reasoning of the Magistrate's decision of summary judgment in their favor also supports respondents' claim in this Court that no important question of Federal law is presented here, nor are there conflicts in Federal cases or jurisdictions over this liquor license issue, and the cities' right to so regulate. The reasoning of the summary judgment in favor of these respondent-defendants

indicates that cities can regulate liquor licenses and, therefore, this case does not present an issue for this Court to settle. The 8th Circuit upheld the Magistrate's ruling of summary judgment in favor of the city and its officials and did so without the need for a printed decision, (see petitioner's appendix for the March 15, 1988, per Curian decision) and without having to cite any authority, as the issue of city liquor license regulation and the power to do so stands without question. If there were conflicting decisions on the same subject, they would have been cited and discussed by the 8th Circuit, or by petitioner, but same was not necessary as no such conflict in the law exists and, therefore, that presents yet

another reason to deny certiorari. Respondents submit that the Magistrate's decision is a logical sequence of reasoning leading to its conclusion that petitioner could not have made a submissible jury case and that, at this stage, summary judgment was appropriate. Respondents noted early on in their argument to the 8th Circuit that the centerpiece of the Magistrate's reasoning was the decision in the Celotex case. (Celotex Corp. vs. Catreet, 477 U.S. 106, 106 S.Ct. 2548, 91 L.Ed.2d 265 [1986]). Celotex, supra, plus the equally recent case of Anderson vs. Liberty Lobby, Inc., 91 L.Ed.2d 202 (1986) together establish the modern standard for cases involving summary judgment, particularly as it applies to granting same in favor of

the respondent when the petitioner has not made, or cannot make, a submissible case. Summary judgment is now viewed not to be a harsh remedy, but one appropriate and expeditious when the facts indicate it is appropriate. A brief summary of the two decisions (Celotex and Liberty Lobby) would say that the new standard of review provides that the mere existence of some alleged factual disputes will not defeat a properly supported motion for summary judgment, i.e., the emphasis is on the requirement that there be no genuine issue of material fact (emphasis from Liberty Lobby), and that after discovery, a summary judgment will be sustained against a party who fails to make a showing sufficient to establish

the existence of essential elements to his case over which he has the burden (Celotex). A failure of proof by a plaintiff over issues, as in the case at bar, like the existence of malice or arbitrariness renders all other facts immaterial and subjects a plaintiff to dismissal by summary judgment, just as a verdict would have been directed in favor of respondents had the case gone to trial. (A "mirror" standard between summary judgment and Rule 50(A), directed verdicts [Liberty Lobby]).

The Magistrate took the standards established by Celotex and Liberty Lobby, supra, to determine that there were no material factual disputes between Lafferty and the City of Cooter and that the question was

one of law. He further determined that petitioner could not sustain his burden as a matter of law to prove arbitrariness here (the "essential element," Celotex, supra) on the part of these defendants. That made summary judgment, at that stage, appropriate just as a directed verdict for these respondents would have been at trial. The cross-motions for summary judgment filed by this petitioner and respondents in the District Court relied upon and set out a large segment of the depositions, admissions and discovery of these parties. This gave the Magistrate the crux of the testimony of all parties, petitioner and respondents. The Magistrate then was saying that based upon the evidence and extensive

testimony presented in the motions, he would have directed a verdict in favor of these respondents. The Magistrate decided upon the whole record before him, as brought to him by the vehicle of motions for summary judgment, that there was no need for a trial (the language of Liberty Lobby, supra), albeit that there were no genuine factual issues that properly could be decided only by a finder of fact. To get to that conclusion, it was necessary to pull out and determine the undisputed facts. These briefly were: That the only reason petitioner was denied a beer license was petitioner's inability to obtain the necessary number of signatures on a petition as required by the ordinance; that Cooter had no zoning, nor did the

Magistrate or the 8th Circuit find that Cooter was required by Missouri law to have zoning; that there was no location in Cooter that was not within 600 feet of a residence; that while the proposed location for the license is within what could be stretched to be called a "business" area of Cooter, it is not exclusively commercial or business, as there are residences nearby and, in fact, practically existing at the back door of some businesses and right across the street; that the respondent city, mayor, and aldermen had worked with and cooperated with petitioner in regard to the petition and signature process; that petitioner claimed no ill will, no unfair treatment, and no impermissible motives by or from these

respondent city officials as they worked with him, and his family, for over two months to determine if petitioner could get the requisite number of signatures.

The case then was appearing quickly, by reason of these uncontested facts, to be appropriate for summary judgment. These facts were physical facts such as the actual locations of residences and businesses. The further facts involved were a matter of public record as contained in the minutes of the Board of Aldermens' meeting and in the actual petition itself with its lack of signatures as submitted by petitioner. No dispute on these facts did or could arise. Therefore, the Magistrate properly found that each side was

agreeing the only issue as to respondents' liability is one of construction of the ordinance, an issue of law rather than fact. Northern Natural Gas Company vs. O'Mally, 277 F.2d 128 (8th Cir. 1960); League to Save Lake Tahoe vs. Capitol Enterprise, 685 F.2d 1142, 1144 (9th Cir. 1982); Standard Oil Company vs. Department of Energy, 596 F.2d 1029, 1066 (Temporary Emergency Court of Appeals, 1978).

Turning then to the ordinance itself, it is clear that the Magistrate found that a fourth class city such as Cooter does not have to have zoning. Ch. 89 RSMo. is clearly permissive. (See petitioner's appendix). Therefore, plaintiff cannot validly claim that Cooter, by

its liquor ordinance, is zoning without following the requirements of Ch. 89 RSMo. The purpose of the disputed ordinance is also clear. It is a liquor license ordinance. It only speaks about liquor and licenses. Most of the cited cases deal with other types of facts, not liquor licenses. Its sole purpose is to set procedures and requirements for the issuance of liquor licenses. The crux of respondents' argument to deny petitioner's certiorari is that cities do have the authority to so regulate that particular activity, citing as did the Magistrate, State ex rel. Payton vs. City of Riverside, 640 S.W.2d 137, 140 (Mo.App. 1982), thus, making this a case that is not calling out for new determinations in the U.S.

Supreme Court. Applying the actual facts, i.e. the small size of Cooter and the actual mixture of residences and businesses, as shown by the attachments and exhibits to the motions for summary judgment, it was reasonable and obvious to see that zoning in Cooter, with its small population of 480 people, covering a small area, would be impossible, impractical and unworkable. Therefore, the only purpose of the Board was regulating intoxicating liquors which is within their delegated authority, and as the Magistrate quoted, same is not to be disturbed if susceptible of reasonable construction. (Payton, supra). The Magistrate indicates that a reasonable construction, based upon these actual

physical, undisputed facts, as presented in the motions, is that Cooter meant to require the signature procedure that they set forth clearly in the ordinance for any location in Cooter. That was Mayor Cooper's interpretation as contained in his deposition. That was respondent Keen's reasonable interpretation when she succinctly summed it up by saying "... We're not zoned, our community is so small that we are not zoned as residential or commercial or business." (Keen's deposition). These opinions were given importance by the Magistrate, for "The interpretation of an ordinance by the body in charge of its enactment and application is entitled to great weight." Coots vs. J.A. Tobin

Construction Co., 634 S.W.2d 249 (Mo. 1982). State, ex rel. Lack vs. Melton, 692 S.W.2d 302, 304 (Mo. 1985); State ex rel. Lebeau vs. Kelly, 697 S.W.2d 312 (Mo. App. 1985). The interpretation must be given in light, therefore, of the legislative objective which was obvious here to regular liquor licenses. Collins vs. Director of Revenue, 691 S.W.2d 246, 251(Mo. 1985). The depositions are full of references by these respondents expressing their reservation and fear of having the problems again in towns which can come from the existence of too many taverns. Years ago, there had been a liquor establishment at this very location and there had been numerous problems. This is a legitimate concern of a law

making body according to the Magistrate. It demonstrates their conscientious feeling for their town and not any impermissible or malicious attitude. More importantly here, that concern clearly proves that what was being sought to do here was to regulate and set forth a procedure for liquor licenses, not to carve up the town or start making distinctions between businesses and residential districts when there had never been any before because of the intermixture of businesses and residences. This was petitioner's first line of attack, but the obvious facts and purposes and concerns expressed by the respondents mitigated against petitioner's interpretation.

Petitioner has also attacked the consent requirement itself which the 8th Circuit found by their summary decision to be permissible as a way to regulate this particular type of license and activity. Respondents assert that the cases cited by petitioner to the 8th Circuit failed to provide a basis to invalidate the Cooter Ordinance and/are significantly distinguishable from the Cooter case. Larkin vs. Grendels Den, Inc., 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505 (1982) involved a Massachusetts State Statute, applying a state law, not a local city ordinance which allowed one very narrow specialized group (school and churches) to have a direct veto power over a liquor license if the liquor premises were

located within 500 feet of the church or school. Plaintiff, in the Larkin case, did not assert a civil rights violation and the statute was struck down as being invalid upon the narrow grounds and rationale that the said statute was advancing religion and, therefore, violated the separation of church and state. This case is radically distinguishable on its facts from the Cooter experience. In particular, under the Cooter Ordinance, no one person or institution could veto a liquor license, nor does any violation take place in regard to a specialized group. Justice Rehnquist, dissenting in Larkin, supra, believes the emphasis on religious advancement and the establishment clause was "silly," but

he cites some general authority favorable, by analogy, to the respondents in our case at bar as follows: (l.c. 308 (L.Ed.). "The majority concedes, as I believe it must, that an absolute legislative bar on liquor outlets within reasonable prescribed distances from churches, schools, hospitals and like institutions would be valid." California vs. LaRue, 409 U.S. 109, 120, 34 L.Ed. 342, 93 S.Ct. 390 (1972).

Therefore, even the majority in the Larkin case indicates that there can exist legislative restraints on liquor outlets by way of "prescribed distances." That reasoning is found and further pronounced by the District Court Magistrate in citing the

Missouri Payton case, supra, when he sustained the respondents' motions for summary judgment. The state can certainly so regulate liquor to protect churches just as fourth class cities, smaller cities by definition, can protect its citizens, all in a legislative community concern for this particular area, to-wit, liquor licenses.

The State of Washington ex rel. Seattle Title Trust Company vs. Roberge, 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928) cited by petitioner has no application. It was not a civil rights case in any respect, but rather was a challenge in state court against the city building superintendent; it involved the construction of a home for the aged, not the issuance of a

license or liquor license (respondents again in this court, as they did below, urge that liquor license cases involve a specialized separate law of significance and application all their own); it was a case where a comprehensive zoning law did exist as part of the zoning plan of a large metropolitan area, Seattle, Washington, even in 1928; the zoning ordinance in Seattle Title contained numerous other restrictions for different enumerated uses of land, i.e.,signatures of 50% of owners within 200 feet of a proposed stable or building containing domestic animals and two-thirds of owners were required to sign within 400 feet of a home for children,which were not addressed or ruled on. Petitioner

next cited two old cases, one decided in 1893 and one in 1915 (Hayes vs. Poplar Bluff, 173 S.W. 678 (Mo. 1915); St. Louis vs. Russell, 22 S.W. 470 (Mo. 1893), that involved challenges to building permits filed in state courts, thereby affecting different purposes, i.e., that of actual land use. Our case, on the other hand, was properly found to not be a regulation of a land use, but was obviously and specifically a liquor license ordinance with the regulating of liquor its sole concern.

When the Missouri courts have looked at these type of ordinances specifically applying to liquor licenses, such as State ex rel. Hewlett vs. Womach, 196 S.W.2d 809, en banc (Mo. 1946), they have held

that the cities can additionally regulate liquor licenses with ordinances that contain stricter requirements than the general enabling State Liquor Control Act, if same "preserved the public peace, good order and security against changes arising from the traffic in such liquors."(Womach l.c. 815). The Womach court emphasized that liquor regulation is a special field of law, subject to more regulation, of necessity, by its very nature. Petitioner cites no liquor case in any jurisdiction holding that it is invalid to require a percentage of nearby owners to consent before a liquor license is issued. The Womach case held that the ordinance, involving a 75% signature petition of

owners within 600 feet (exactly the Cooter Ordinance), was not invalid but with no need to discuss any constitutional questions. At this point, with that 1946 ruling as cited in Womach, it is necessary to again cite the 1982 case of Payton, supra, which indicates that in Missouri there is clearly no inherent right to engage in the liquor business. Therefore, since there is no constitutional right to have a liquor license, the defendants-respondents could not have possibly violated Lafferty's rights by denying the license, and thus have the protection of their qualified immunity. That further made summary judgment appropriate, and makes certiorari inappropriate, as this is not an issue

for constitutional review and importance, nor do conflicting decisions exist. This is again emphasizing the special consideration and different treatment given by the leglislatures and courts to liquor licensing, thereby again rendering the cases cited by petitioner involving building permits and land use or anything not involving liquor inappropriate and not in point. Because there is no inherent or fundamental right here, the District Court Magistrate found petitioner was not in a protected class and it has always been the law in that regard that "Before anyone may inject a constitutional issue in a case, his constitutional rights must be directly affected." Citizens Mutual Fire and

Lighting Insurance Society vs. Schoen, 93 S.W.2d 669 (Mo. 1936). Thus, with no case holding the Cooter type of ordinance invalid and with Missouri not recognizing a fundamental constitutional right to hold a liquor license, the Magistrate was correct in granting summary judgment in favor of these respondents. This same reasoning would support respondents' position that this case is not one for the granting of certiorari. (Supreme Court Rule 17).

Since the Womach case cited by plaintiff contained the identical language of the Cooter Ordinance and same was not held to be invalid, these defendants have shepardized Womach and find the following history of reasoning of interest and present it to the court.

Since the enactment of the liquor control laws in Missouri, the more modern decisions have developed a precise set of rules and guidelines in regard to the judicial scope of review of city ordinances that deal with all aspects of liquor licenses, including their issuance (which is our specific concern here). These would be cited in reference to petitioner's quote from Justice Brandeis back in 1891, which reasoning has not been followed by the Courts in allowing liquor license regulations.

We start out with a "legal presumption of validity which attends a municipal ordinance." Passley vs. Johnson, 304 S.W.2d 903 (Mo. 1957). Further, in regard to an ordinance that enlarges upon the requirements of the state statutes,

"As a general rule, an ordinance which supplements a state law and enlarges upon the requirements of the statute, creates no conflict unless the statute limits the requirements for all cases to its own prescriptions. Vest vs. Kansas City, 194 S.W.2d 38 (Mo. 1946). And although the ordinance may enlarge upon the provisions of a statute by requiring more than the statute requires, it may not prohibit what the statute permits or permit what the statute prohibits." Womach, supra, Nichols vs. North Kansas City, 214 S.W.2d 710 (Mo. 1948).

Taking this scope then a step further and bringing it up to the present state of the law,

> "The trial court in reviewing the court's decision is not the trier of fact. ...It reviews the propriety of the legislative decision, and if that decision is fairly debatable and is supported by substantial evidence of reasonableness and necessity, the legislative decision must be upheld - it may only be overturned if found to be arbitrary, unreasonable and clearly erroneous." J.C. Nichols Company vs. City of Kansas City, 639 S.W.2d 886 (Mo.App. 1982); Payton, supra.

Specifically, in regard to fixing standards before the issuance of a license, Cooter can additionally cite State ex rel. Kimberling vs. Peterson, 214 S.W.2d 739 (Mo. 1948), as authority: "Cities may fix standards

to be met before (our emphasis) issuing a liquor license," and consistent with the authority above, "... only requirement being that the ordinance must not conflict with the statute." (l.c. 741). State ex rel. Copper Kettle Restaurants, Inc. vs. City of St. Robert, 424 S.W.2d 73 (Mo. App. 1968). (Restricted actual number of licenses to issue in the town).

These grounds provide support for the Magistrate's decision granting these respondents a summary judgment, and they lead us to the last step in the Magistrate's reasoning and decision, which was then upheld by the 8th Circuit. Up to this point, using Celotex, and the principles above, he had found the interpretation of the ordinance to be reasonable. There

were no historical reasons or physical facts in evidence by the motions for summary judgment that indicated Cooter could be divided into separate residential or business districts. These facts and the clear objective of the ordinance to regulate liquor licenses allowed him to quickly dismiss the petitioner's theory of construction under "expressio unius." Bailey vs. Federal Intermediate Credit Bank of St. Louis, 788 F.2d 498, 500 (8th Cir.) (1986). The reasonable interpretation was that everyone applying for a liquor license had to comply with the consent requirement of obtaining 75% of the landowners' signatures that lived within 600 feet of the proposed location. Metro Auto Auction vs.

Director of Revenue, 707 S.W.2d 397 (Mo. 1986); Collins, supra. In using the historical and physical evidence provided to him by respondents in the motions for summary judgment, the Magistrate had adhered to the primary rule of construction which, in these type of cases, is that, "to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the manifest purpose of the statute, considered historically (our emphasis) is properly given consideration." Citing City of Flat River vs. Mackley, 212 S.W.2d 462 (Mo. 1968); 2 Lewis, Sutherland on Statutory Construction, 2d Edition, Section 363; Endlich on

Interpretation of Statutes, Section 329 and Maxwell on Statutes (5th Edition), 425. The Mackley case involved the construction of an ordinance which involved the sale of intoxicating beverages. That case also, back in 1948, followed the general rules above that a municipality is not prohibited from exacting additional requirements so long as there is no conflict between the ordinance and the state statute. In addition to citing the Vest case, supra, the Mackley case gave attention to 43 corpus juris, Municipal Corporation, Section 220(B). The Magistrate had additionally found that the City had the power to so regulate and that their enlargement of requirements before licensing was not

in violation of the State Liquor Control Law. The Magistrate had further correctly seen that petitioner had no fundamental right under Missouri law to have a liquor license and was, therefore, found not to be in a protected class. This brought him to the last step in his analysis which was to determine if the denial of the license was undertaken by these defendants with malice or with some type of impermissible motive which caused a depravation of a constitutional right.

In reaching the conclusion in reference to the absence of malice, respondents first point to our District Judge Wangelin's decision in this case when he allowed their immunity defense to stand after their

answer was filed dated October 18, 1985. He indicated the standard to be followed:

> "The court finds and defendants agree that they are protected by the qualified immunity. Accordingly, the defendants herein are liable only if one, they knew or reasonably should have known that their actions violated plaintiff's clearly established rights, or two, they took the action with malicious or impermissible motives causing a depravation of constitutional rights to plaintiff." Chase vs. McMasters, 573 F.2d 1011, 1019 (8th Cir. 1978); Burns vs. City of DesPeres, 534 F.2d 103 (8th Cir. 1978); Monell vs. Department of Social Services of City of New York, 436 U.S. 658 1978; Herrera vs. Valentine, 653 F.2d 1221 (8th Cir. 1981).
>
> Defendants' defense of a qualified immunity is a viable argument and may prove to be meritorious as discovery in this matter continues. Consequently, defendants' qualified immunity defense will not be stricken.

Respondents add to the Chase case, supra, the authority contained in Burns vs. City of DesPeres, 534 F.2d 103 (8th Cir. 1978); Monell vs. Department of Social Services of City of New York, 436 U.S. 658 1978; Herrera vs. Valentine, 653 F.2d 1221 (8th Cir. 1981).

It was after the discovery, which was extensive, that the motions for summary judgment were filed by these defendants which detailed the evidence and testimony. The Magistrate quoted from those deposition experts and found that petitioner himself conceded there were no ill feelings involved, and that respondent officials had fairly given him ample opportunity and time to obtain the signatures required. Quoting from Mayor (and respondent) Cooper's deposition:

> "Q. Do you know what the reason for amending that ordinance was?
>
> A. To be able to control the license to the point that -- we had a very bad problem with dope, and the element that was in town, we had had several burglaries, and the townspeople were very upset because we could not do anything about some of the problems going on, we had trouble regulating the times which they opened and closed, they would not abide by any ordinances that we had, and because of the concern of the people, one of which was Mr. Lafferty's brother that voiced the biggest concern, we need to do something about the pool hall, and we amended our laws, because we felt our laws were not adequate."

This doesn't sound like a malicious Alderman. It is a conscientious and concerned one not found by the Magistrate or the 8th Circuit to be acting by an impermissible motive. 2 C. Sands and M. Libonati Local

Government Law, Section 11.10 (1981). These respondent officials all stated that when it came down to voting on the petitioner's application, the only reason they voted no was because of the failure of petitioner to get the requisite signatures - a strict compliance with the ordinance. They felt they had to vote no or the ordinance would have no meaning.

Giving Lafferty the benefit of all reasonable inferences, the Magistrate found no showing by petitioner that respondents acted maliciously, it was determined that petitioner presented no set of facts possible which would entitle petitioner to relief. Celotex, supra.

Further, there was found to be no dissimilar treatment in the

approval of the petitioner's relative (the one mentioned in Mayor Cooper's quote above), in regard to his package license next door. That license existed long before the ordinance was passed and was treated as being "grandfathered in." The Cooter Ordinance itself also provided a mechanism to monitor the conduct of already licensed liquor businesses within the community. The sections of the Cooter Ordinance were found to balance and compliment each other in regard to covering the field for licenses in existence and those being sought after the passage of same.

In summary and conclusion, the respondents urge this court to uphold the Magistrate's decision in the District Court granting them summary

judgment by here denying certiorari to the petitioner. The facts in this case and the authorities cited applicable to those facts indicate that the petitioner could not have made a submissible case under any favorable inference. The entire case in the way of deposition excerpts, testimony, affidavits, maps, pleadings, and the like, all were in front of the Magistrate and, upon reviewing same, he decided in light of Celotex and Liberty Lobby, supra, that summary judgment was appropriate. The essential elements of petitioner's case, particularly those surrounding the alleged malice of these respondent city officials, had been nonexistent and could not be proven for purposes of submitting the matter to a jury.

It was clear to the 8th Circuit panel that the respondents in their legislative function were sincere Aldermen and protectors of the rights and liberties of the people which they represented. The adverse party, petitioner, admits the conscientiousness and fairplay exhibited. The ordinance has a rational basis in the history of the community and the Magistrate was correct in pinpointing that a reasonable interpretation obviously meant by these respondents was that anyone coming before the Board of Aldermen in the community of Cooter, Missouri, would simply have to present a petition giving the consent of 75% of those persons within 600 feet of the proposed location. There is no

Missouri case which strikes down that consent requirement, as Missouri pays particular and close attention to the right of the cities to regulate liquor licenses in particular. That reasonable interpretation, when made in light of the history and physical facts here presented, was not vague to anyone. There is no "fundamental right to engage in the liquor business" involved here, which is further cited by respondents for the proposition that petitioner cannot raise this case to a necessary level for a decision in this Court, (the Payton, supra, was cited by the Magistrate as the clear law in Missouri).

Stated simply, this is not a case for review for this Court and

certiorari should be denied. The Magistrate's decision and the 8th Circuit's affirming of same does not need review, as cities can regulate liquor licenses in Missouri without question. Thus, no important question or set of facts for national attention is presented, nor is that determination in conflict with other decisions. (S.Ct. Rule 17).

Respectfully submitted,

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